

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 1080 MB 2004

M/s Sona Small Industries	--	Petitioners
Versus		
State Bank of Patiala	--	Respondents

Hon'ble Rajesh Tandon, J.

Hon'ble B.C. Kandpal, J.

Oral Judgment [Per Hon'ble Rajesh Tandon, J]

Heard Sri. Tanveer Alam Khan learned counsel for the petitioner and Sri Ashish Joshi, learned counsel for the respondent no. 1.

By the present writ petition, the petitioner has prayed for the writ of mandamus commanding the respondents to permit the petitioner to sell the property in question by way of plotting through private negotiation with a condition that the sale proceeds will be kept at bank and after paying the entire dues of the bank, remaining amount may be paid to the petitioner.

Further, direction in the nature of mandamus has been sought commanding the respondents to settle the account of the petitioner by realizing the rate of interest in accordance with the guide line formed by the Reserve Bank of India.

Briefly stated, the petitioner has claimed himself to be the proprietorship firm owned by Mr. Mulakh Raj Arora.

According to the case of the petitioner, the respondent has agreed to grant a Cash Credit Facility to the petitioner for the expansion of his business of rice Mill. The loan facility was granted in favour of the petitioner. Cash credit limit of Rs. 25 lacs were sanctioned on 18th September, 2001.

Sri Tanveer Alam Khan, learned counsel for the petitioner has submitted that the petitioner could not continue his business and as such he has suffered huge loss in the business. Since he could not pay the

dues, the recovery was sent against the petitioner for an amount of Rs. 39.30 lacs.

Sri Ashish Joshi, learned counsel for the respondent has pointed out that the notice has been issued on 25th June, 2004 u/s 13/2 of Securitisation and reconstruction of Financial Assets and Enforcement of Security and Interest Act, 2002

Sub clause 2 of Section 13 of the Act provides that any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4) of Section 13 of the Act.

Sub clause 4 of Section 13 of the Act provides that in case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely :-

- a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset.
- b) take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realize the secured asset.
- c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor.
- d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to

the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

As referred in sub-clause 4 of Section 13 the secured creditor has power to take possession of the secured asset of the borrower including the right to transfer as indicated above. The power has also been given to take over the management of the secured asset of the borrower.

The petitioner, therefore, having been issued the notice under sub-clause 2. of Section 13 of the Act, the remedy, therefore, lies by filing the objection which shall be decided by the authority concerned.

The counsel for the respondent has referred the judgment of Apex Court recorded in 2004 Vol. IV (2004) 4 SCC page 311 where it has been held by the Apex Court as under:-

“Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under Section 13(4) of the Act have been taken, a mechanism has been provided under Section 17 of the Act to approach the Debts Recovery Tribunal. The abovenoted provisions are for the purpose of giving some reasonable protection to the borrower. Viewing the matter in above perspective, we find what emerges from different provisions of the Act, is as follows:-

- 1. Under sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days’ notice before proceeding to take any of the measures as provided under sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the*

earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information / knowledge of the borrower without giving rise to any right to approach the Debts Recovery Tribunal under Section 17 of the Act, at that stage.

- 2. As already discussed earlier, on measures having been taken under sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debts Recovery Tribunal.*
- 3. That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay / interim order subject to the condition as it may deem fit and proper to impose.*
- 4. In view of the discussion held in this behalf, we find that the requirement of deposit of 75% of the amount claimed before entertaining an appeal (petition) under Section 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.*
- 5. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the court.*

A perusal of the record shows that notice has been issued under sub-section 13 (2), of the Act. The petitioner has been given right to file objections.

We find that in pursuance of the notice, objection has been filed by the petitioner.

The present writ petition is premature and the petitioner will have a remedy after the order passed in accordance with sub-section 4 of Section 13 by the appropriate authority under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

The respondent is directed to pass the appropriate order u/s 13 of the Act after hearing the petition. However, liberty is given to the petitioner to take all the plea before the authority concerned which are sought to be taken in the present writ petition.

Writ petition is disposed of accordingly. No. order as to cost.

(B.C. Kandpal, J.)

(Rajesh Tandon, J.)

Date : 01.11.2004

Shiv